

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

NEW YORK, CHICAGO AND ST. LOUIS R. R. CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerk's Agreement by the following arbitrary action:

(a) By assigning employe C. A. Madigan from one seniority district to position in another seniority district where he held no rights.

(b) By refusing to assign the position to employe Mrs. Mary Walsh who holds seniority rights in the seniority district where the position and work is located.

(c) Claim that the Carrier be required to correct the agreement violation by assigning Mrs. Walsh, position of Clerk, rate \$166.70 per month, and she be reimbursed for all losses sustained.

(d) Claim that all employees involved in or affected by the agreement violation be compensated for all monetary loss suffered.

EMPLOYEES' STATEMENT OF FACTS: Under date of April 1, 1942, position of Clerk in Assistant General Freight Agent's Office at Cleveland, Ohio, rate of pay \$166.70 per month, was advertised under Bulletin No. 17. This position is carried on Traffic Department Solicitation Line Roster. Mrs. Mary Walsh, seniority date on this roster as of October 17, 1927, and Mr. J. P. Connally, seniority date on this roster as of April 21, 1941, filed their applications with the designated official consistent with the provisions of Rule 7 of Clerks' Agreement.

Mr. Charles A. Madigan, and several other clerical employees holding rights only on the Transportation Department, Cleveland Ohio Freight Station Roster, applied for this position under the provisions of Rule 15, effective August 3, 1940. Mr. Madigan was arbitrarily assigned this position on April 15, 1942. Mr. Madigan's rights are confined strictly to the Transportation Department Roster and he holds no rights whatsoever on the Traffic Department Roster. Mrs. Walsh and Mr. Connally were the only employees that held rights (seniority) in the seniority district where the position and work is located.

POSITION OF EMPLOYEES: The employees quote the following rules from working agreement effective January 1st, 1936.

other clerk in the office was Mr. Theodore Stratton, who had only a few months earlier entered the service as a stenographer and who did not bid for the position.

It is the position of the carrier that Mrs. Walsh is not now, nor was she at the time the position was filled, qualified to handle the position for which she has made claim, and that, as a consequence, the claim of Mr. Connolly for difference between his rate of pay and hers is not sustainable.

As brought out in carrier's statement of facts, the claims made to the carrier in this case were only on behalf of Mrs. Walsh and Mr. Connolly and claims for no other individual employes were made during the negotiations. Therefore, it is the opinion of the carrier that claim (d) as it reads is not properly before the Board. However, if the Board elects to consider it, the carrier desires to submit the following:

1. Revised Rule 15 of the Clerk's agreement, effective August 5, 1940, reads as follows:

"Employes covered by these regulations filing applications for positions bulletined in other seniority districts will, consistent with the provisions of rule 8, be given preference over non-employes, or employes not covered by these regulations, on the basis of their roster seniority."

2. Mr. Madigan, whose bid was accepted, began his service with the Nickel Plate Road as messenger in the Cleveland Local Freight office on April 20, 1923, and moved thru various clerical positions in the Local office, holding the position of Switching Clerk at the time the change was made. He has done particularly good work during the trying period through which we have been passing, and has shown great ability. His excellent service and qualifications have brought forth very favorable comment from the shipping public.

3. It is our position that Mr. Madigan is well qualified for the position and that his appointment to it was an action of exactly the type contemplated by revised Rule 15 of the Clerks' agreement quoted herein.

Premises considered, the carrier urges that the claims be denied.

OPINION OF BOARD: The claimant, Mary Walsh, bid for the position of Clerk in the Assistant General Freight Agent's Office at Cleveland. The position is in the Traffic Department Solicitation Line Seniority District. Charles A. Madigan, who held seniority rights in another District, was awarded the position. The Carrier justifies its refusal to award the position to the claimant on the ground that she lacked the necessary qualifications for the work. The Committee claims that the rules relating to seniority have been violated and particularly Rules 8 and 9 (a) which read as follows:

"Rule 8.

"Promotions or the awarding of other bulletined positions coming within the scope of these rules, shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

"NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

"Rule 9.

"(a) Employes accepting promotion or awarded bulletined positions will be allowed thirty (30) working days in which to qualify, except where it is plainly seen within a period of ten (10) working days

that the employe cannot qualify, he may be removed from the position by mutual agreement between the management and clerks' committee. Disqualified employes shall return to former position, if available."

Similar rules to 8 have been interpreted in a number of awards. 96, 396, 1147, 1441, 1588, 2031.

The Committee suggests that Rule 9 (a) requires the Carrier to award the position to the senior bidder who, subject to the provisions of the rule, will be given thirty days in which to qualify. We do not so construe the rule. The Carrier is obligated under Rule 8 to award the position to the applicant having the highest seniority provided that employe has the requisite fitness and ability. Rule 9 (a) recognizes that a favorable decision with respect to qualifications may turn out to be erroneous and that the designated employe under the actual stress of work may fail to fulfill expectations. The rule merely provides a method for correcting the mistake. It was suggested in argument that the Carrier, thus having a means to correct errors, should be less rigid in the determination of fitness in the first instance.

It is not the province of this Board to determine the question of fitness and ability. In the nature of things, if railroads are to be operated with efficiency and safety, this decision must be made by the management. At the same time it is obvious that seniority provisions will mean but little if that power is to be treated as an absolute one. This Board has a right of review to this extent,—that it must appear from evidence before this Board that the Carrier's decision is made in good faith "and on the basis of substantial evidence of want of fitness on the part of the particular employe who deems himself aggrieved." Award 396. See also Awards 96, 1147, 1588, 2031.

We are in accord with the contention of the Committee that the question relates solely to the fitness of this claimant and not to whether someone else is better qualified.

The evidence seems to be clear that the work of the position is much more exacting than is the case in the position now held by the claimant. It involves the proper routing of freight shipments, and particularly the routing of them in such a way as will be most advantageous for this Carrier, and the answering of inquiries on this subject and the contacting of shippers in an effort to persuade them to accept changes in routing. To perform these duties properly requires a knowledge of routes, tariffs, train schedules, and great patience and tact in dealing with the shipping public. It is work which necessitates the assumption of real responsibility.

There seems to be no question but that Mrs. Walsh has been faithful in her present job. Her long years of service weigh heavily as proof of that. She sets forth her own qualifications in a straightforward statement. With the exception, however, of very occasional filling in for brief periods often during the lunch hour in taking care of routine matters and in tracing cars for a few shippers with whom her dealings have been satisfactory, she shows very little actual understanding of the most difficult duties of the position. She has offered letters from two former occupants of the position who know her and feel that she could do the work. On the other hand we have the opinions based on substantial grounds of numerous others, both officials of the Carrier and high rated employes in the Clerical department, who feel that she not only has very little knowledge of the requirements of the position but that it would be very difficult for her to acquire that knowledge or to assume the responsibility which the work requires. The Assistant General Freight Agent with whom she has been associated almost continuously since 1924 is very emphatic that she has neither the temperament, the general knowledge, nor the ability to handle the work even under normal conditions, much less under the pressure now existing. There is clearly no feeling against

her, but in fact appreciation for what she has done in her present position. There is much more from others to the same general effect. There is nothing in the record to show any prejudice, ill feeling, or bad faith on the part of those who have expressed these views nor is there anything to justify a charge that she has been discriminated against because of her sex.

We have been over the record with the very greatest care to see if there is any reasonable ground on which this Board would be justified in overruling the decision of the Carrier. We can find none. It is not a question of what we would have done had we been in the Carrier's place. It is solely a question whether the Carrier has shown reasonable ground for its action.

Whether C. A. Madigan, who was awarded the position is entitled to it under the rules is not, in the view which we take of Mrs. Walsh's claim, before us. His rights will undoubtedly be decided in submissions by third parties who are not here involved. Likewise the claims of other employees should not be prejudiced by what we have here decided. Claims (a) and (d) should therefore be dismissed and claims (b) and (c) which concern Mrs. Walsh should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the agreement in refusing to award the position to Mrs. Walsh.

AWARD

Claims (a) and (d) dismissed without prejudice. Claims (b) and (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 5th day of April, 1943.